

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CIVIL JURISDICTION**

**Winding Up Cause No. HBF 15 of 2009L**

**IN THE MATTER OF KHAN BUSES**  
**LIMITED**

**AND**

**IN THE MATTER** of Companies Act

**BETWEEN** : **ALEEMS INVESTMENT LIMITED**

**Petitioner**

**AND** : **KHAN BUSES LIMITED**

**Respondent**

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**FINAL JUDGMENT**

**Of: Inoke J.**

**Counsel Appearing: Dr. M. S. Sahu Khan for the Petitioner**  
**Mr. A. Patel for the Respondent**

**Solicitors: Sahu Khan & Sahu Khan & Associates for the**  
**Petitioner**  
**S. B. Patel & Co. for the Respondent**

**Date of Hearing: 16 September 2009**

**Date of Judgment: 25 September 2009**

**INTRODUCTION**

[1] This is an application by the Petitioner, Aleems Investment Limited, to wind up the Respondent, Khan Buses Limited, based on alleged debt owed by Khan Buses.

[2] The Petition was filed on 9 July 2009. On 17 July I granted an order on an ex parte application by Khan Buses restraining Aleems Investment from taking any further proceedings upon the Petition until further order. I was satisfied that there was urgency in the application, there was likelihood of irreparable harm or serious mischief being caused to Khan Buses if the winding up proceedings were advertised and damages was not an appropriate or adequate remedy.

### **THE BACKGROUND**

[3] The Petition eventually came for hearing on 16 September 2009. On the morning of the hearing, Dr Sahu Khan, Counsel for Aleems Investment, sought leave to withdraw the Petition on the grounds that Khan Buses had shown in its affidavits that the debt was disputed. I was minded to grant leave but Mr Anu Patel, Counsel for Khan Buses, objected very strongly. He had strict instructions to pursue the hearing of the application and had informed Dr Sahu Khan of his instructions when the latter advised him of the proposed withdrawal of the Petition. He submitted that it was not just as simple as giving leave on request.

[4] My attention was caught by Mr Patel's submission that I could and should refuse leave to withdraw, hear the Petition and order that not only the Petition itself, but all other actions based on the facts of this case be permanently stayed. I was attracted by the novelty of this argument so I heard both Counsel and now deliver my judgment.

[5] I was not prepared to adjourn the application as it had been set down for hearing despite Dr Sahu Khan's application to withdraw. I drew his attention to the Court of Appeal decision in **Krishna Brothers v Post and Telecommunications Ltd** [2005] FJCA 36; ABU0028.2004S (29 July 2005) which said:

“It is improper conduct by counsel to appear on a date set for hearing with sufficient instructions only to seek an adjournment. If he cannot be ready to conduct the case on a date he knows is already fixed for hearing, he should not accept instructions.”

[6] Dr Sahu Khan argued that he was not seeking an adjournment but I saw no difference in his application to withdraw a petition and an application for adjournment because the end result is the same – the hearing does not take place.

### **THE PETITION & AFFIDAVITS**

[7] The Petition was supported by an affidavit sworn by Mohammed Aleem Khan (Aleem), the Managing Director of Aleems Investment. Two affidavits in opposition were filed on behalf of Khan Buses; the first is by Mohammed Nasir Khan (Nasir), the original founder of the company, and the second by his son Mohammed Naved Yakub Khan, who is now the Managing Director. Despite being given leave to file a further affidavit in response, none was filed by Aleem. I do not think that it would have made any difference to the outcome of this application.

[8] I have closely examined the affidavits and find the following facts established. Sometime in early March 2000, Aleem approached Nasir requesting a loan. Aleem told Nasir that he was aware that Khans Buses had an overdraft facility with the Habib Bank that was not being used at that moment and that a manager, one Asad Khan (Asad), at the Bank could arrange for Aleems Investment to use that unused facility. Nasir told Aleem that he would agree to that proposal if the facility was restored within 90 days and Khan Buses would not in anyway be liable for repayment. On 7 March 2000 Aleem drove them to Bank’s Suva office and they met with Asad and the Bank’s accountant. Nasir repeated what he had told Aleem that he was agreeable to the proposal so long as Khans Buses would not be liable for repayment of the facility, interest or charges. The unused overdraft facility was for \$200,000. It was accepted and at the request of Asad, Nasir wrote a

cash cheque for \$200,000 to be drawn out of the facility account. That cheque was deposited into an account in the name of "ASHLEEM INVESTMENT LIMITED" on 7 March 2000. The records of that company are not available at the Companies Office but Nasir believes that Aleem is connected with it. The facility was not repaid by Aleem or Ashleem Investment Limited. Despite the arrangements agreed to in Suva on 7 March 2000 the Bank pursued Khan Buses for repayment of the facility. Several attempts to resolve the matter failed but it appears, as deposed by Aleem in his affidavit, that Aleems Investment paid back the facility to the Bank on 28 January 2005. Aleems Investment now issues this winding up petition in an attempt to recover that payment to the Bank.

### **CONSIDERATION OF THE PETITION**

[9] I find these facts extraordinary. I also find the filing of this Petition equally as astounding because Nasir's affidavit revealed that Dr Sahu Khan was told in February 2001 of the arrangements with the Bank. I give him the benefit of doubt that his memory might have faded until he was reminded of it when the affidavit was served at his office after the Petition was filed.

[10] I say extraordinary because this is a petition based on a debt that is the Petitioner's own. The only connection between the Petitioner and the Respondent is that the \$200,000 was drawn out of the Respondent's account. The money was not for the benefit of or used by the Respondent. The Bank has been paid back so, even if it had a claim against Khan Buses, that is now extinguished. I cannot see any basis at law whatsoever for Aleems Investment to recover from Khan Buses the money it had paid to the Bank.

[11] It is trite law that a person does not have to pay a debt that is not his. Similarly, it is trite law that a s 221 Companies Act demand and winding up petition cannot be issued for a debt that is not the respondent company's or, worse still, the petitioner's own debt owed to someone else. On these principles alone, the Petition as well as any court action against Khan Buses

based on these facts, whether by writ or otherwise, should be permanently stayed. If the money has been used by **Ashleem Investment Limited** or some other person then those are the proper parties to pursue. Not Khan Buses. If the issue of these proceedings or subsequent proceedings is to facilitate joinder of some other parties, when Aleem knows full well the circumstances behind the dealings with the Bank, no clearer case of abuse of process or of a frivolous and vexatious action can be found. He can sue those persons independently of Khan Buses.

[12] As I said earlier, I was attracted by the apparent novelty of Mr Patel's submission but it was the extraordinary facts and circumstances of this case, which did not surface until I heard Counsel and examined the affidavits, which made this case so unusual. In any event, the conclusions that I have reached are supported by two Australian cases of very high authority cited by Mr Patel: **Williams v Spautz** [1992] HCA 34; (1992) 174 CLR 509 (27 July 1992) and **Australian Beverage Distributors Pty Ltd v Evans & Tate Premium Wines Pty Ltd & Anor** [2007] NSWCA 57 (22 March 2007).

[13] The use of the **Companies Act** statutory demand as a means of embarrassing alleged debtors to pay up disputed debts in Fiji is notorious. I think I would be failing in my duty if I did not fully consider the law on abuse of process which is squarely raised in this Petition. These are cases of very high authority and in the absence of such cases in Fiji comprehensively dealing with the law in this area I would respectfully adopt them here as our law.

[14] In **Australian Beverage Distributors Pty Ltd v Evans & Tate Premium Wines Pty Ltd & Anor** [2007] NSWCA 57 (22 March 2007), Beazley JA, with whom Hodgson and Santow JJA agreed, delivering the judgment of the NSW Court of Appeal stated the principles of abuse of process as they applied to winding up proceedings as follows:

**"Abuse of process as it applies to winding-up proceedings**

47 Senior counsel for ABD submitted that his Honour erred in his approach in finding an improper purpose. Senior counsel submitted that such a finding can only be made on the basis of the principles stated by the High Court in Williams v Spautz. It was submitted that although his Honour referred to Williams v Spautz, he did not apply those principles and his finding in relation to abuse was erroneous in principle. In particular, it was submitted that in order for there to be an abuse of process it was necessary to find that proceedings had been commenced without an intention to prosecute them to finality, notwithstanding that the moving party has a prima facie case: see Mason CJ, Dawson, Toohey and McHugh JJ in their joint judgment at 521. The improper purpose must also be the predominant purpose of the moving party: see joint judgment at 526. For the reasons discussed below, it is not necessary to consider this last matter.

48 It was further submitted that the onus was on the party alleging abuse of process to establish the abuse, that the onus was “a heavy one” and that the power to grant a permanent stay was one that would only be exercised in exceptional circumstances: see Williams v Spautz joint judgment at 529. It was submitted that there was no evidence that ABD did not intend to prosecute the proceedings to a conclusion and accordingly there was no basis upon which to find abuse of process.

49 ABD’s submission raises this controversy between the parties. Senior counsel for ABD contends that the findings made by his Honour were findings that ABD acted in abuse of the processes of the Court, so that the principles in Williams v Spautz applied. Senior counsel for the Evans & Tate companies submitted, however, that the “abuse of process” principles applied by his Honour and upon which the companies relied, was abuse of the winding-up process, not abuse of process per se. Senior counsel submitted that there was well-established authority to support the notion of abuse of the winding-up process. It was submitted that the Evans & Tate companies never sought to make out a case based on the principles in Williams v Spautz.

50 Senior counsel for the Evans & Tate companies accepted that Williams v Spautz is authority that there will be an abuse of process if a party commences proceedings with no intention of prosecuting those proceedings to finality. It followed, as senior counsel properly conceded, that, there being no evidence that ABD did not intend to prosecute to finality, the principles stated by the High Court in Williams v Spautz had no application.

51 However, they submit that his Honour’s finding on abuse of process is not based on the principles stated by the High Court in Williams v Spautz. Rather, his Honour was applying the well-known principle of abuse of process as it relates to winding-up applications. They submit that the principles that apply in that circumstance are well-established: see, for example, Fortuna Holdings Pty Limited v Deputy Commissioner of Taxation [1978] VR 83; Re Jeff Reid Pty Ltd and the Companies Act (1980) 5 ACLR 28; Pacific Communication Rentals Pty Ltd v Walker (1993) 12 ASCR 287; Braams Group Pty Ltd v Miric (2002) 171 FLR 449; [2002] NSWCA 417; and State Bank of New South Wales v Tela (No 2) (2002) 188 ALR 702; [2002] NSWSC 20 per Barrett J.

52 In Fortuna Holdings McGarvie J was considering the principles that applied when a court was asked to restrain the presentation of a winding-up petition under the Companies Act 1961 (Vic). His Honour observed at 87 that when considering such application, the Court is exercising its inherent jurisdiction to prevent an abuse of process. His Honour observed that the courts have intervened where the presentation of the petition might cause irreparable damage to the company and that the authorities disclosed that that could occur in two distinct situations, which for convenience, his Honour referred to as the first and second branch of the principle. The ‘first branch’ applies where the application to wind up must fail, either as a matter of law or as a matter of fact, because of the absence of supporting evidence.

He thus described the 'first branch' as applying where "the proposed [application] cannot succeed".

53 His Honour then dealt with the 'second branch'. He said that the second branch applied where there was a more suitable alternative means of resolving a disputed claim against the company sought to be wound up. In that case, his Honour acknowledged that it was possible that if the winding-up application was allowed to proceed, it might be successful. In such cases, the applicant to wind up might be able to present a legal entitlement to do so with a ground sufficient in law and with sufficient evidence to support the ground. His Honour said, however, at 93:

"... due to the availability of the more suitable alternative remedy, the Court hearing the petition would in the circumstances, in the exercise of its discretion, decline to make a winding up order, at least while the circumstances remain as they are at the time of the application for an injunction." (Emphasis added)

54 In Re Jeff Reid Pty Ltd McLelland J was dealing with a case where a company had failed to comply with a statutory demand under s 221(1)(b) of the Companies Act 1961 (NSW). His Honour observed that a failure to pay a debt on demand did not constitute "a neglect" to do so within the meaning of the legislation. His Honour considered that the existence of a counter claim based on substantial grounds for an amount equal to or exceeding the debt will generally be a reasonable cause for not paying the debt in accordance with the demand. That was so, regardless of any question of set-off.

55 In Pacific Communication Rentals Pty Ltd v Walker Brownie J, having noted that it had been established in Williams v Spautz that it was the duty of every court to protect itself against the abuse of its process, considered that in circumstances where a party served a statutory demand for the payment of a debt in circumstances where that party had retained the books of the plaintiff that were necessary to allow the other party to determine whether such debt was in fact due, it was appropriate to grant an injunction restraining the commencement of winding-up proceedings based upon that statutory demand. His Honour considered that the defendant's conduct was either an abuse of process or an attempted abuse of process and the plain purpose of his conduct was to coerce the plaintiff into meeting his claim under threat of winding-up proceedings without giving the plaintiff the opportunity to check the veracity of the claim.

56 The statutory demand procedure under the earlier versions of the companies legislation was very different from that which applies under the Corporations Act, and many of the cases of abuse of process in the winding-up context arose in circumstances where there had been a failure to pay pursuant to a statutory demand. Nonetheless, the Evans & Tate companies submit that there will be circumstances where the court considers it appropriate to grant an injunction or to grant a temporary stay of proceedings until the entire question of indebtedness of the companies has been determined and that in such circumstances, the principles stated in the earlier authorities still apply.

57 I agree that those principles still apply. The court retains a discretion to make an order in the circumstances discussed by McGarvie J in Fortuna Holdings under the 'second branch' or upon the basis referred to by McLelland J in Re Jeff Reid in a case where an application for winding-up has been brought in circumstances where the statutory demand procedure was not relied upon. The reference by Brownie J in Pacific Communication to Williams v Spautz was not intended to indicate that the principles stated by the High Court were those that applied. Rather, he was saying that Williams v Spautz is authority that the Court has an inherent jurisdiction to prevent an abuse of process. The circumstances in which he found abuse of process

clearly indicate that he was applying the long standing principles that govern the court's exercise of discretion when dealing with a winding-up application."

[15] In **Williams v Spautz** [1992] HCA 34; (1992) 174 CLR 509 (27 July 1992) Mason CJ, Dawson, Toohey and McHugh JJ of the High Court of Australia said:

"24 In our view, the power must extend to the prevention of an abuse of process resulting in oppression, even if the moving party has a prima facie case or must be assumed to have a prima facie case. Take, for example, a situation in which the moving party commences criminal proceedings. He or she can establish a prima facie case against the defendant but has no intention of prosecuting the proceedings to a conclusion because he or she wishes to use them only as a means of extorting a pecuniary benefit from the defendant. It would be extraordinary if the court lacked power to prevent the abuse of process in these circumstances."

...

39. In his dissenting judgment in Goldsmith v. Sperrings Ltd., Lord Denning M.R. was of the view that to issue a writ for an improper purpose constitutes without more an abuse of process (48) (1977) 1 WLR, at pp 489-490. His Lordship appears to have regarded the cases on the tort of collateral abuse of process, including Grainger v. Hill, as supporting this proposition. In this respect, Lord Denning may well have been incorrect. However, his Lordship was right in treating the comments of Lord Evershed M.R., when he delivered the judgment of the Court of Appeal in In re Major, as supporting the proposition. There, Lord Evershed referred (49) (1955) Ch, at pp 623-624 to a general rule

"that court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed and exist; and a party so using or threatening proceedings will be liable to be held guilty of abusing the process of the court and therefore disqualified from invoking the powers of the court by proceedings he has abused".

In our view, that is a correct statement of the principle."

[16] Brennan J in a separate judgment said:

"8. These cases show that a plaintiff's intention to achieve a result must be distinguished from his motive for commencing or maintaining a proceeding, though the distinction may be elusive. In Bayne v. Baillieu (71) [1908] HCA 39; (1908) 6 CLR 382, at p 403, O'Connor J. cited with approval a statement by Holroyd J. in a Victorian case (72) In re Morrissey (1899) 24 VLR 776, at p 778.

"I think that if the object of an act is legal, and there is no wrongful intention in it, but the intention is to do something also legal, founded upon that act - it is perfectly immaterial what the ulterior motive of the party may be - what it may be that prompts him to do the legal act."

That principle was held to be applicable to an act done in exercise of a legal right arising under a contract or other instrument in Chapman v. Honig (73) [\(1963\) 2 QB 502](#), at p 520 in which Pearson L.J. said

"I cannot think of any case in which such an act might be invalidated by proof that it was prompted by some vindictive or other wrong motive. Motive is disregarded as irrelevant."

In a given case, a distinction may have to be drawn between the purpose of the proceeding and the motive of the plaintiff in commencing or maintaining it (74) XCO Pty. Ltd. v. Federal Commissioner of Taxation [\[1971\] HCA 37](#); [\(1971\) 124 CLR 343](#), at pp 350-351. That distinction depends on a disparity between the plaintiff's intention and the plaintiff's motives. Intention relates to the result which the plaintiff desires to obtain by commencing or maintaining the proceeding; motive relates to all the considerations which move that party to commence or maintain the proceeding. The desired result is no doubt an element of the moving considerations, but it does not exhaust those considerations.

9. In a case where a plaintiff intends to obtain relief within the scope of the remedy available in a proceeding, there is no abuse of process whatever the plaintiff's motives may be. Isaacs J. said in Dowling (75) (1915) 20 CLR, at pp 521-522.

"If the object sought to be effected by the process is within the lawful scope of the process, it is a use of the process within the meaning of the law, though it may be malicious, or even fraudulent, and in the circumstances the fraud may be an answer; if, however, the object sought to be effected by means of the process is outside the lawful scope of the process, and is fraudulent, then - both circumstances concurring - it is a case of abuse of that process, and the Court will neither enforce nor allow it to afford any protection, and will interpose, if necessary, to prevent its process being made the instrument of abuse."

For the reasons given by the majority judgment in this case, his Honour's reference to fraud should be understood as importing a purpose outside the scope of the remedy and improper.

10. There is no impropriety of purpose (whatever may be said of motive) when a plaintiff commences or maintains a proceeding desiring to obtain a result within the scope of the remedy, even though the plaintiff has an ulterior purpose - or motive - which will be fulfilled in consequence of obtaining the legal remedy which the proceeding is intended to produce. To amount to an abuse of process, the commencement or maintenance of the proceeding must be for a purpose which does not include - at least to any substantial extent - the obtaining of relief within the scope of the remedy. As Isaacs J. said in Varawa v. Howard Smith Co. Ltd. (76) [\[1911\] HCA 46](#); [\(1911\) 13 CLR 35](#), at p 91.

"the term 'abuse of process' connotes that the process is employed for some purpose other than the attainment of the claim in the action. If the proceedings are merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the Court is asked to adjudicate they are regarded as an abuse of process for this purpose".

11. Putting to one side, then, the cases where the plaintiff intends to obtain relief within the scope of the remedy, the problematic cases arise when the plaintiff's purpose is to obtain some benefit, to impose some obligation or to affect some

relationship otherwise than by verdict, by order or by compromise of the particular claims made in the proceeding. These are cases where the plaintiff's objective lies outside the relief which, if the proceeding were prosecuted to completion, might be obtained by verdict or by order. The general principle applicable when a plaintiff intends to obtain a result outside the scope of the remedy was stated by Lord Evershed in In re Majory (77) (1955) Ch 600, at pp 623-624.

"court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed and exist; and a party so using or threatening proceedings will be liable to be held guilty of abusing the process of the court and therefore disqualified from invoking the powers of the court by proceedings he has abused."

Expounding the distinction made by Lord Evershed between the purpose of gaining a "collateral advantage" and the purpose for which proceedings "are properly designed and exist", Bridge L.J. said in Goldsmith v. Sperrings Ltd. (78) (1977) 1 WLR 478, at p 503.

"For the purpose of Lord Evershed's general rule, what is meant by a 'collateral advantage'? The phrase manifestly cannot embrace every advantage sought or obtained by a litigant which it is beyond the court's power to grant him. Actions are settled quite properly every day on terms which a court could not itself impose upon an unwilling defendant. An apology in libel, an agreement to adhere to a contract of which the court could not order specific performance, an agreement after obstruction of an existing right of way to grant an alternative right of way over the defendant's land-these are a few obvious examples of such proper settlements. In my judgment, one can certainly go so far as to say that when a litigant sues to redress a grievance no object which he may seek to obtain can be condemned as a collateral advantage if it is reasonably related to the provision of some form of redress for that grievance. On the other hand, if it can be shown that a litigant is pursuing an ulterior purpose unrelated to the subject matter of the litigation and that, but for his ulterior purpose, he would not have commenced proceedings at all, that is an abuse of process. These two cases are plain; but there is, I think, a difficult area in between. What if a litigant with a genuine cause of action, which he would wish to pursue in any event, can be shown also to have an ulterior purpose in view as a desired byproduct of the litigation? Can he on that ground be debarred from proceeding? I very much doubt it."

His Lordship's doubts reflect the decisions in, and are confirmed by, King v. Henderson and Dowling. I respectfully adopt the phrase "reasonable relationship" to formulate a test similar to (though it may not be identical with) the test propounded by Bridge L.J. in this passage. I would formulate the test in this way: if there be a reasonable relationship between the result intended by the plaintiff and the scope of the remedy available in the proceeding, there is no abuse of process. If there be mixed purposes - some legitimate, some collateral - I would restate his Lordship's test that "but for his ulterior purpose, (the plaintiff) would not have commenced proceedings at all". So expressed, the test casts on the other party an onus of proving what the plaintiff would not have done if he had not formed the intention of obtaining a collateral advantage. That onus may be impossible to discharge. If that onus were discharged, the other party would establish that the plaintiff had not commenced or maintained the proceeding for any substantial legitimate purpose. The gravamen of the test, I apprehend, is that the plaintiff did not commence or maintain the proceeding for any substantial legitimate purpose. I would state the test in that way. Substantiality is a matter of degree, ascertained by reference to the intention attributed to the plaintiff in all the circumstances of the case. At the end of the day,

the court must determine, by reference to the intention attributed to the plaintiff, not merely whether the collateral purpose of the proceeding outweighs any legitimate purpose but whether the plaintiff entertained any substantial intention that the proceeding should achieve a legitimate purpose.

12. For these reasons, I would hold that an abuse of process occurs when the only substantial intention of a plaintiff is to obtain an advantage or other benefit, to impose a burden or to create a situation that is not reasonably related to a verdict that might be returned or an order that might be made in the proceeding.”

[17] It is obvious that once there is a finding that the Petition in this case was doomed to fail and that Aleem knew as well as his solicitors that Khan Buses did not owe any money to his company then such a substantial intention as mentioned by Brennan J exists and the further prosecution of this Petition or any proceedings based on these facts will constitute an abuse of process.

### **COSTS**

[18] There remains the issue of costs. Having come to the view that I have taken of this Petition that there is no clearer case of abuse of process, an award of costs on an indemnity basis is justified: see **Khan v Carpenters Fiji Ltd [2009] FJHC 149; HBC132.2003 (23 July 2009)**.

[19] Two substantial affidavits have been filed by Khan Buses together with an affidavit of service. I have heard an ex parte application with no award of costs. This application took about an hour or more and numerous cases have been cited and copies supplied to the Court by Mr Patel. In the circumstances, I think an award of \$5,000 is justified and I so order.

### **ORDERS**

[20] The Orders are therefore as follows:

1. The Petition filed herein on 9 July 2009 is permanently stayed.

2. Any further proceedings, howsoever commenced, in respect of the arrangements entered into between the parties and Habib Bank on 7 March 2000 and the said Petition, other than an appeal in respect of this Judgment, are also stayed and the court registries are directed not to accept or issue any such proceedings.
  
3. The Petitioner shall pay the Respondent's costs of \$5,000 within 14 days.

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**Sosefo Inoke**

**Judge**

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